

² The Board notes that, following the November 27, 2018 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 29, 2012 appellant, then a 24-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on March 23, 2012 he sustained cramping on his right side when he placed a bag on a conveyor belt while in the performance of duty. OWCP accepted his claim for abdominal strain.

On June 17, 2014 appellant filed a recurrence (Form CA-2a) alleging that he stopped work on March 9, 2014 due to increased pain from his March 23, 2012 injury. On the reverse side of the claim form, the employing establishment noted that he returned to full-duty employment on March 27, 2012 after the injury.

In a development letter dated July 10, 2014, OWCP advised appellant that additional evidence was required to support that his recurrence was due to a worsening of the accepted work-related condition without intervening cause. It afforded him 30 days to submit the necessary evidence.

On July 30, 2014 OWCP received multiple claims for compensation (Form CA-7) for leave without pay from March 9 through July 26, 2014. In a letter dated August 8, 2014, it informed appellant that it could not process his claims for wage-loss compensation until it has adjudicated his pending recurrence claim.

By decision dated August 11, 2014, OWCP denied appellant's claim for recurrence, finding that the evidence of record was insufficient to establish that he required additional medical treatment due to a worsening of his accepted employment-related condition, without intervening cause.

In a report dated August 19, 2014, Dr. Gregory C. Maidoh, a Board-certified nephrologist, indicated that appellant had a history of chronic flank pain and lower extremity paresthesia, which dated back to a twisting injury while at work. He noted that, upon examination, appellant's pain "might be" due to lumbar disc disease, and opined that this condition was related to the twisting injury.

In a letter dated August 21, 2014, OWCP informed appellant that compensation was not payable from July 27 through August 9, 2014 because his claim for recurrence was denied on August 11, 2014. It indicated that he must exercise his appeal rights.

On October 21, 2014 appellant requested reconsideration. He related that his back pain began on March 23, 2012 and that he had been in constant pain since that incident that gradually worsened through the years. Appellant noted that he had been to many specialists and had undergone many medical tests which have not produced any reasoning or clear diagnoses for his pain.

In a report dated December 30, 2014, Dr. Michael A. Wilensky, a Board-certified neurologist, diagnosed thoracic radiculopathy. On February 18, 2015 he reported that appellant continued to have right thoracic pain and secondary to thoracic radiculopathy, which originated after an injury at work in March 2012.

By decision dated April 21, 2015, OWCP modified the August 11, 2014 decision, thereby vacating it in part, finding that the evidence of record was insufficient to support that appellant's accepted condition had not resolved, and thus his claim remained open for medical treatment. However, it also affirmed the August 11, 2014 decision in part as the evidence of record was insufficient to establish total disability commencing March 9, 2014 due to the accepted March 23, 2012 employment incident.

On April 21, 2016 appellant requested reconsideration of OWCP's April 21, 2015 decision.

In a report dated April 20, 2016, Dr. Warren Williams, a Board-certified neurosurgeon, indicated that he initially examined appellant on March 12, 2014. He related that appellant had undergone gallbladder surgery in June 2013 and anterior cruciate ligament repair surgery in July 2013. Dr. Williams indicated that these diagnoses were secondary to the employment-related incident. He noted that appellant complained of right-sided pain, that activities involving movement of the right lateral spine resulted in disabling pain, and that bending, twisting, reaching, and rotating aggravated his symptoms. Upon reviewing a magnetic resonance imaging scan of appellant's thoracic spine, lumbar spine, cervical spine, and knee, a sonogram of his gallbladder, and a computerized tomography scan and gastroscopy of his abdomen, Dr. Williams related an impression of chronic mechanical pain. He opined that the diagnosis was, "more probably than not," related to repetitive lifting of bags, and that appellant's present limitations and residual symptoms were the result of the injury sustained by repetitive lifting of heavy objects. Dr. Williams indicated that appellant was clearly disabled from gainful employment with a permanent limitation of prolonged sitting, standing, lifting of weight greater than five pounds, and no twisting or climbing stairs.

By decision dated June 30, 2016, OWCP denied modification of its April 21, 2015 decision, finding that the evidence of record was insufficient to establish that appellant's disability was due to the accepted employment-related condition.

On August 15, 2016 appellant requested reconsideration of OWCP's June 30, 2016 decision.

In a report dated June 29, 2016, received by OWCP on August 15, 2016, Dr. Maidoh noted diagnoses including myositis, fusion of spine (lumbosacral region), and pain in unspecified knee.

By decision dated September 21, 2016, OWCP denied modification of its June 30, 2016 decision, finding that there was no evidence of record supported by objective findings explaining how appellant's employment-related accepted condition had worsened to the point that he was totally disabled and unable to work in any capacity.

On July 8, 2017 appellant requested reconsideration.

In a report dated June 10, 2014, Dr. Maidoh noted that appellant had a history of chronic pain, and that his symptoms prevented him from engaging in employment-related activities that were manually or physically exerting. He noted that appellant had similar symptoms two years prior while performing employment-related activities that involved lifting luggage. In a report dated May 3, 2017, Dr. Maidoh diagnosed right lumbar pain.

By decision dated August 25, 2017, OWCP denied modification of its September 27, 2016 decision, finding that the evidence of record was insufficient to establish that appellant was totally disabled from all work for the period claimed, causally related to the accepted injury.

On May 21, 2018 appellant requested reconsideration of OWCP's August 25, 2017 decision.

A diagnostic testing report dated April 9, 2018, was received which related that Dr. Wilensky had performed electromyograph and nerve conduction velocity studies. He related that these studies indicated normal findings except for mild chronic denervation in the extensor digitorum brevis muscles.

By decision dated November 27, 2018, OWCP denied reconsideration of the merits of appellant's claim, finding that the evidence received after its August 25, 2017 decision was irrelevant or immaterial to the issue presented.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.³

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁷

³ 5 U.S.C. § 8128(a).

⁴ *Id.*

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁸ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at 20 C.F.R. § 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; and he has not advanced a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The underlying issue in this case was whether appellant had established total disability for the claimed period due to the accepted employment injury.

In support of his request for reconsideration, appellant submitted a diagnostic testing report dated April 9, 2018 from Dr. Wilensky, which noted abnormal findings in appellant's extensor digitorum foot muscles. While this evidence was new to the record, it is not relevant to the underlying issue as it does not address disability during the period claimed causally related to appellant's accepted March 23, 2012 employment injury, which was accepted for abdominal strain. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ As such, appellant is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹²

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹³

⁸ *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁹ *S.D.*, Docket No. 18-1734 (issued March 12, 2019); *see Mark H. Dever*, 53 ECAB 710 (2002).

¹⁰ *P.L.*, *supra* note 8; *Annette Louise*, 54 ECAB 783 (2003).

¹¹ *E.G.*, Docket No. 17-1955 (issued September 10, 2018); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² 20 C.F.R. § 10.606(b)(3)(iii).

¹³ *Id.* at § 10.608; *J.R.*, Docket No. 18-0064 (issued May 10, 2019); *see also D.R.*, Docket No. 18-0357 (issued July 2, 2018); *Susan A. Filkins*, 57 ECAB 630 (2006).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board